UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

THE STANDARD FIRE INSURANCE COMPANY	:	
v.	:	CIVIL NO. 1:03CV103
JAMES R. MARTIN, PAUL S. DANNENBERG and ANNE C. DANNENBERG	:	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
(Papers 10 and 13)

The plaintiff, The Standard Fire Insurance Company (hereinafter "Standard Fire"), asks the Court to find it has no obligation to defend or indemnify its insured, defendant James Martin, in an underlying lawsuit brought against Martin by co-defendants Paul and Anne Dannenberg. Martin has filed a cross-motion for summary judgment, arguing that a comparison of the Dannenbergs' allegations and the relevant provisions of the insurance contract requires Standard Fire to defend and indemnify him in the underlying suit. For the reasons set forth below, Standard Fire's Motion for Summary Judgment is GRANTED, and James Martin's Motion for Summary Judgment is DENIED.

Background

On a motion for summary judgment, the moving party has the initial burden of informing the Court of the basis for its

motion and of identifying the absence of a genuine issue of material fact. See, e.g., Chambers v. TRM Copy Centers, Corp., 43 F.3d 29, 36 (2d Cir. 1994). Where, as here, a motion for summary judgment is supported by affidavits or other documentary evidence, the party opposing that motion must set forth specific facts showing there is a genuine, material issue for trial. See Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994). Only disputes over facts which might affect the outcome of the suit under the governing law preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Upon review of the record, the Court finds the following material facts undisputed. The Dannenbergs and Mr. Martin are feuding neighbors in Huntington, Vermont. In April 2002, the Dannenbergs commenced a civil action against Martin in Chittenden Superior Court (hereinafter the "underlying action").

On or about December 23, 2002, the Dannenbergs filed an amended complaint and supporting affidavits. See First Amended Complaint and Application for Preliminary Injunction (appended to Paper 10 as Exhibit A)(hereinafter "Amended Complaint"). The Amended Complaint delineates eleven counts: willful, malicious and reckless creation and maintenance of a private nuisance (Count I); nuisance (Count II); negligence

(Count III); negligent violation of [dog] ordinance (Count IV); malicious trespass to real property (Count V); malicious assaults of plaintiffs (Count VI); malicious battery of plaintiffs (Count VII); malicious defamation of plaintiffs (Count VIII); malicious intentional infliction of emotional distress and campaign of harassment of the plaintiffs (Count IX); malicious prosecution of the plaintiffs (Count X); and malicious abuse of process (Count XI).

The Dannenbergs and Martin live "directly across the street from each other on Delfrate Road." Amended Complaint at para. 7. Most of the Dannenbergs' problems are related to Martin's operation of his "hobby trout pond." The Dannenbergs' complaint also contains details about an allegedly "vicious" dog named "Grizzly," which Martin has encouraged to menace and attack the plaintiffs and otherwise has refused to properly secure.

According to the Dannenbergs,

> Defendant has since on or about the summer of 1997 conducted and operated this hobby trout pond in such a manner as to produce an unreasonable amount of noise from the running of an aerator compressor machine. Said aerator compressor equipment is positioned approximately 150 feet from Plaintiffs' property. Said structure is erected, located and maintained so that it produces excessive and unnecessary noise and has been so located or maintained by Defendant maliciously, for the primary purpose of annoying, harassing, and injuring the Plaintiffs, with no benefit accruing to Defendant.

Amended Complaint at para. 10.

The Dannenbergs further allege:

> Plaintiffs have given notice to the Defendant on August 8, 1997, and at other times, that the nuisance noise was injurious to the Plaintiffs and deprived Plaintiffs of valuable incidents of their right to use and enjoy their property, and demanded the abatement thereof, but the Defendant refused to abate said nuisance.
>
> . . . On September 22nd 1997 during a telephone call from Paul Dannenberg concerning the noise coming from Defendant's aerator compressor machine, James R. Martin stated "I understand it bothers you" and further stated "I don't care what you want". Thereafter, Defendant continued to use the aerator compressor machine in a manner and with the intent to create a nuisance and to injure the Plaintiffs.

Amended Complaint at paras. 15-16.

Throughout the Amended Complaint, the Dannenbergs maintain Martin acted "maliciously" and operated his aerator compressor "in a manner intended to injure the Plaintiffs" and "for the purpose of annoying the owners of adjoining property." Amended Complaint at para. 11. Furthermore, they allege: "Defendant is liable to Plaintiffs for [his] intentional, oppressive, and malicious maintenance of said nuisance and nuisances, Defendant having acted with a conscious disregard of Plaintiff's rights and with full knowledge of the consequences of his conduct and the

substantial injury being caused to Plaintiffs." Amended Complaint at para. 23.

Plaintiff Standard Fire issued Martin a series of homeowner's insurance policies, the last of which expired on July 17, 1999. See Paper 10 at Ex. B (hereinafter referred to as "the policy"). In relevant part, the policy provides:

> **COVERAGE E - PERSONAL LIABILITY**
>
> If a claim is made or a suit is brought against any **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, even if the claim or suit is false, we will:
>
> a. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
>
> b. provide a defense at our expense by counsel of our choice. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the **occurrence** equals our limit of liability.

Paper 10, Ex. B at 12, Section II Liability Coverages at E. (emphasis in original).

The policy further states: "'**occurrence**' means an accident, including exposure to conditions, which results, during the policy period, in [] **bodily injury**[,] **property damage**" or "**personal injury**." Paper 10, Ex. B at 1, Definition 6, as supplemented by the Value Added Package at 1.

Under "Exclusions," the policy reiterates that personal liability coverage does not apply to bodily injury or property damages "which is expected or intended by any **insured**." Paper 10, Ex. B at 12, Section II Exclusions at 1a.

Discussion

Standard Fire argues the harms which the Dannenbergs have alleged in the Amended Complaint do not constitute "occurrences" as defined in the policy; therefore, it has no duty to indemnify or defend the underlying action.

"An insurance policy must be construed according to its terms and the evident intent of the parties as expressed in the policy language." City of Burlington v. National Union Fire Ins. Co., 163 Vt. 124, 127 (1994). An insurer's duty to defend or indemnify is determined by comparing the language of the policy with "the allegations upon which the claim is stated." Commercial Union Ins. Co. v. City of Montpelier, 134 Vt. 184, 185 (1976). Allegations of a complaint drafted with an apparent attempt to create a duty to defend, however, are not dispositive. See Cooperative Fire Ins. Ass'n of Vt. v. Bizon, 166 Vt. 326, 335 (1997)("Nor do we believe that the fact that defendant phrased his tort claim in terms of negligence is determinative.").

Coverage under Martin's insurance policy is triggered by an "occurrence." The policy defines "occurrence" as an "accident." "An 'accident' is generally understood to be an event that is 'undesigned and unforeseen'." Northern Sec. Ins. Co. v. Perron, 172 Vt. 204, 211 (2001)(quoting Webster's New International Dictionary 15 (2d ed. 1961)). The Vermont Supreme Court also has defined an "accident" as "an unexpected happening without intention and design." City of Burlington, 163 Vt. at 128 (citation and quotations omitted).

In the underlying action, the Dannenbergs essentially have alleged that Martin has knowingly and deliberately harassed them. They specifically aver that Martin acted with the intent to cause them distress and harm, thereby making disingenuous any attempt to now construe their complaint as alleging unintentional, accidental behavior. See Woodstock Resort Corp. v. Scottsdale Ins. Co., 927 F. Supp. 149, 154 (D. Vt. 1966)("To the extent that Clement claimed that Woodstock acted out of malice . . . the complaint cannot be construed to allege an accident."). Martin's conduct, as outlined by the Dannenbergs was not accidental and therefore cannot constitute an "occurrence" under Martin's Standard Fire Homeowner's Policy. Cf. Landry v. Dairyland Ins. Co., 166 Vt. 634, 635 (1997)("accident" implies "lack of intent by the responsible parties, rather than the victim's lack of foresight").

It is true that, under Vermont law, even intentional actions may constitute an "occurrence" if the "intentional act . . . results in unintended injury." Northern Sec., 172 Vt. at 211. As the Vermont Supreme Court recently explained:

> The determination of whether [an insured's] alleged actions constituted an occurrence involves an inquiry into whether he expected or intended to harm the victims by his actions. "[A]n insured expects an injury if he or she is subjectively aware that injury is substantially certain to result." Espinet v. Horvath, 157 Vt. 257, 262, 597 A.2d 307, 310 (1991)(Allen, C.J. dissenting). Thus, if the insured did not intend to inflict the injury on the victim by his intentional act, and the act was not so inherently injurious that the injury was certain to follow from it, the act as a contributing cause of injury would be regarded as accidental and an "occurrence."

Id. at 213-14 (footnote omitted).

The problem here is that the Dannenbergs specifically allege that Martin intended the injuries he is alleged to have caused them. See City of Burlington, 163 Vt. at 129 (distinguishing other cases where "the insured intended no injury to the party who brought the claim(s) for which coverage was sought [because in that case] it cannot be said that Burlington intended no injury to the plaintiffs . . ."). Even Counts Three and Four, delineated as "negligence" claims, allege that Martin "well kn[e]w[his] dog to be vicious and accustomed to attack[ing] and threaten[ing] the Plaintiffs." Amended Complaint at para. 33. In his affidavit filed in

support of the Amended Complaint, Paul Dannenberg further states that, despite his repeated complaints, Martin "encouraged" his dog to chase and attack. Dannenberg Affidavit (appended to Amended Complaint) at para. 3. Like his operation of his trout pond, Mr. Martin's refusal to control his dog is alleged to be malicious and intentional, and continued for the purpose of harassing the Dannenbergs.

Lastly, in Counts VIII, X and XI of the Amended Complaint, the Dannenbergs allege defamation, malicious prosecution, and abuse of process. To the extent they maintain that these counts constitute personal injuries which Martin did not intend to cause, those claims are still not "occurrences" under the policy because they are alleged to have happened after the policy's expiration date. Count VIII is based on two allegedly defamatory letters which Martin published in October 2001. See Amended Complaint at para. 63. Counts X and XI are based on Martin's filing of a civil complaint against the Dannenbergs in November 2001. See Amended Complaint at paras. 78 and 86. Because Martin's insurance policy expired on July 17, 1999, there is no coverage for these claims.

Conclusion

The Dannenbergs' Amended Complaint in the underlying action does not give rise to Standard Fire's duty to defend or indemnify James Martin. Standard Fire's Motion for Summary Judgment is GRANTED. James Martin's Motion for Summary Judgment is DENIED.

SO ORDERED.

Dated at Brattleboro, Vermont, this_____ day of September, 2003.

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J. Garvan Murtha
United States District Judge